Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

CORA GREEN, Individually and as the administrator of the deceased, Ronald Eugene Green; MARTINA ROWE, on behalf of the minor child TEAERA JACKSON; RONALD CAVERS, the father of the deceased, RONALD EUGENE GREEN,

Petitioners,

versus

KENNETH STELLY AND THE CITY OF BATON ROUGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the racial characteristics of a neighborhood and the racial stereotypes of a person's ethnic background, in this case an African-American, be considered in determining whether the amount of force was proper under the circumstances? Is this a patently subjective unconstitutional discriminatory standard which violates the (plain error) doctrine, or alternatively, did the lower courts abuse their discretion in not granting a new trial? Moreover, by allowing the defense attorney to make prejudicial, racial discriminatory statements implicitly and explicitly without any evidence regarding the Deceased, did the lower court err by not granting the Petitioner a new trial because of the incendiary and inflammatory statements in closing arguments? Did Defense Counsel play the "race-card" and get away with it?

I. WHETHER THE LOWER COURTS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS SINCE IN EVALUATING THE USE OF EXCESSIVE FORCE THE COURTS ALLOWED INCENDIARY STATEMENTS WITHOUT ANY SUPPORTING EVIDENCE IN CLOSING ARGUMENT REGARDING THE RACIAL PROFILE OF THE DECEASED AND OTHER NEIGHBORHOOD CHARACTERISTICS?

II. WHETHER THE MOTHER OF THE DECEASED HAD A CONSTITUTIONAL LIBERTY INTEREST AND RIGHT TO PURSUE HER CLAIM FOR LOSS OF ASSOCIATION AND COMPANIONSHIP ARISING FROM THE DEATH OF HER SON?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dated October 15, 1999(199 F.3d 437 (1999)) (1999 U.S.App.Lexis 31624), is set forth in the Appendix, p. 1a. The opinion of the United States District Court for the Middle District of Louisiana dated November 24, 1997 is set forth in the Appendix, p. 7a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit issued its Decision in this case on October 15, 1999. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on November 30, 1999. This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

42 U.S.C. Section 1983

> Section 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress...

STATEMENT OF THE CASE

Ronald Green, (hereinafter referred to as the "Deceased"), an African-American man, died just after 1:00 a.m. on June 18, 1996 in an all African-American neighborhood. The Petitioners are the direct relatives of the Deceased. The Petitioners allege that the acts of conduct of Kenneth Stelly, the officer who shot the Deceased, (hereinafter referred to as the "Officer"), was done under the color of state law and title, violating the Deceased's rights to be free from the use of excessive force.

On June 18, 1996, the Deceased was sitting in his vehicle. Without cause, the Officer ordered him to "...show me your hands". As the Deceased spun around, the Officer shot the Deceased's head, killing him instantly. It was discovered that the Deceased was not holding any weapon. The Officer did find a pair of silver pliers in the vehicle.

On July 9, 1996, the Petitioners filed a complaint in the United States District Court for the Middle District of Louisiana against the Officer and the City of Baton Rouge, (the "Respondents"), seeking damages on the theory of excessive force in violation of 42 U.S.C. Section 1983, that is a violation of the Deceased's constitutional rights; also, the Deceased's mother filed a loss of liberty and association claim.

During the trial, the Officer testified that the Deceased had a metallic object on him and that the Deceased spun it on him. No weapon was later found. Instead, a pair of vice-grip pliers (hereinafter referred to as "pliers") were found on the passenger side of the floor of

the car. During the trial as well as during the opening and closing statements, the defense counsel made numerous comments regarding the background of the victim and the victim's neighborhood. Even though the Petitioners objected and filed motions to stop the comments, the court failed to give any curative instructions to the predominately white jury. On November 24, 1997, the predominately white jury found in favor of the Respondents.

The Petitioners filed a Notice and Motion for Post-Verdict Relief pursuant to Fed.R.Civ.P. 59 based upon the inflammatory statements and comments during the trial and closing statements and the court's failure to provide curative instructions. The Court issued its ruling denying the Petitioners' motion to set aside the verdict and for a new trial on January 22, 1998.

On February 18, 1998, the Petitioners filed an appeal to the Fifth Circuit Court of Appeals. On October 15, 1999, the Fifth Circuit Court of Appeals affirmed the District Court's opinion. The Petition for Rehearing was denied on November 30, 1999.

The Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

I. IMPROPER ADMITTED STATEMENTS IN CLOSING ARGUMENT WITHOUT CURATIVE INSTRUCTIONS VIOLATED THE "PLAIN ERROR" DOCTRINE AND ALTERNATIVELY THE COURT ABUSED ITS DISCRETION IN NOT GRANTING A NEW TRIAL.

Although it has often been stated that due process requires a fair trial, rather than a perfect trial, a court must strive for an atmosphere of perfect impartiality in the conduct of a judicial proceedings. In a jury trial, the district judge occupies a position of preeminence and special persuasiveness in the eyes of the jury, and therefore the judge must be assiduous in performing his function as governor of the trial dispassionately, fairly and impartially. Since the district court allowed evidence and statements to be admitted including stereotypes, race, neighborhood factors and attorney's irrelevant comments, even over the objections of the Petitioners, this conduct resulted in Petitioners being denied a fair trial.

For example the Defense Counsel stated the following in closing:

> Look, when we pass through the front doors downstairs, what do you pass through? Think about it. The first thing's a metal detector. Is there a gun in this courtroom? No. You saw the police officers. Did they have a gun in this courtroom? No, because they checked it downstairs. Everything that comes from

this witness stand, everything in these documents is filtered through the rules of evidence. It has nothing to do with what's on the street. The street is the trenches. There are no rules of evidence. There are no metal detectors. People have guns. People deal dope. People shoot one another. And 99 out of a hundred times that Mr. Ronald Green would have had a gun. Officer Stelly was put in a position and he had no choice. He had to pull that trigger. He got caught in the unfortunate circumstance that this one out of 99 happened to be him. He did what he was trained to do. He did what he was supposed to do. (Tr. Vol. 8, p. 1136, In. 9-24)

(There is nothing in this record that the decedent dealt in dope; there is nothing in the record that the decedent had shot anyone; there is nothing in the record that the decedent ever owned or was carrying a gun.)

But the message you're going to send, if you do what Mr. Nunnery wants you to do, is simply this: An officer, it's one o'clock in the morning on a dimly-lit street full of dope dealers and you have a car and you see a suspicious situation. And these guys weren't out there collecting for the Red Cross at 1:20 in the morning. Gordon Byrd, as you heard what Mr. Berman told you, he ran off with a gun. He could have shot Officer Polito at any time. That's the

kind of stuff that was going through Officer Stelly's mind. Byrd did throw the gun away, but he could have just as easily turned around and blew Officer Polito's brains out.

(There is nothing in the record that there were any dope dealers on the street; that the decedent Green was collecting anything for the Red Cross at 1:20 in the morning. Gordon Byrd's conduct should not form the basis as to the use of force against the decedent Ronald Green.)

What you're going to do is send the message, if you do what Mr. Nunnery wants you to do, you're going to be sending a message to police officers, the people who preserve everybody, the police officers, the people who get the criminals off the street, the people that take the Gary Dahmers (phonetic), the people that take the gangs and everybody else off the street, you're going to send them the message that the next time someone spins on you with something that you think's a weapon, you got to hesitate because may be it couldn't be a weapon. Oh, yeah, and if you get shot, that's too bad. We're not going to have any police officers left. They are either going to be dead, or they're going to leave the force because they don't want to e dead. And I don't think that's an acceptable message. (Tr. Vol. 8 p, 1137, In. 8-p. 1138, ln. 7)

(Gary Dahmer was the individual who was taking body parts of young children then cooking and eating them; he had nothing to do with this case. There was no evidence in this record that Ronald Green was member of a gang.)

Pursuant to the federal rules of evidence, any evidence must have indicia of reliability. As proven in this brief, the Fifth Circuit Court of Appeals have unconstitutionally broadened the definition of "indicia of reliability". The racial profile and a character of a neighborhood and alleged wrongdoer have no bearing upon whether it was justifiable for a police officer to use excessive force. Looking at a person's race to justify excessive force is per se unconstitutional. Without a curative instruction, the District Court abused its discretion in allowing such argument.

A. THE LOWER COURTS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS SINCE IN EVALUATING THE USE OF EXCESSIVE FORCE THE COURTS ALLOWED INCENDIARY STATEMENTS WITHOUT ANY SUPPORTING EVIDENCE IN CLOSING ARGUMENT REGARDING THE RACIAL PROFILE OF THE DECEASED AND OTHER NEIGHBORHOOD CHARACTERISTICS?

The standard for a Section 1983 case involving the use of excessive force was established by this Court in Graham v. Connor, 419 U.S. 386 (1989). The Graham court emphasized that the validity of a claim "must be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized

excessive standard". Id. at 394. Was the act reasonable? In our case, the Officer's acts were clearly unreasonable.

The Fifth Circuit has applied the Graham principles in a two-part test: (1) was the force clearly excessive to the need, and (2) was the excessiveness objectively unreasonable. Strolk v. Ponsetti, 35 F.3d 155, 157 (5th Cir. 1994). As proven in this brief, the Officer's acts were objectively unreasonably since his excuse is based upon unconstitutional evidence, which is irrelevant. A person's character has no bearing on his/her guilt of a wrongdoing. Since the Officer's use of force was objectively unreasonable, his force was clearly excessive in violation of the Fourth Amendment. Graham, supra, at 386. Defense counsel's closing statements introduced racial subjective criterion of the decedent's character and neighborhood, which had nothing to do with the objective criterion articulated in Graham. Clearly, Defense counsel played the race card.

Excessive force is not constitutionally allowable when the encounter lacks sufficient indicia of wrongdoing. In Sibron v. New York, 392 U.S. 40 (1968), this Court determined that an eight hour surveillance yielded only that the alleged wrongdoer was cavorting with several known drug addicts and that the officer's subsequent search based on this information was firmly rejected as unreasonable. In Brown v. Texas, 443 U.S. 47 (1979), the Court determined that a citizen's presence in a high crime area and refusal to identify himself to police lacked adequate indicia of wrongdoing. Id. at 52. In Reid v. Georgia, 448 U.S. 438 (1980), the Court rejected Reid's traveling with another person but walking apart from him and occasionally looking back at his companion, as insufficient suggestion of drug trafficking. Id. at 441. Thus, unless the circumstances as a whole reasonable suggest criminal behavior is likely afoot,

then excessive force and intrusion from an officer is completely unreasonable.

If we applied the other circuit cases and this Honorable Court's previous rulings, then the 5th Circuit Court of Appeals and the Louisiana District Court erred in allowing closing statements without supporting evidence of the neighborhood and racial make-up of the Deceased. The Respondent admitted before the 5th Circuit and oral argument, that there was no evidence in the record to support the incendiary comments. Just because he was in a high crime area and another person ran from his car, excessive force in not justified, especially when no weapon was found at the scene of the crime and it did not appear that the Deceased was fleeing from the scene. [1]

Essentially, the Defendants' theory was that the Decedent has a pair of vice-grip pliers and that the vice-grip pliers was the purported weapon. The Appellant objected to the admissibility of the pliers and the photographs of the pliers being submitted without the necessary foundation or personal knowledge pursuant to Fed.R,Evid. 408 and 602. The Fifth Circuit rejected the Appellant's argument.

The Fifth Circuit found that pursuant to Fed.R,Evid. 901, the Officer's testimony was sufficient to support a finding that the photograph depicted the layout of the Decedent's body and its proximity to the pliers after the shooting, The court erred in stating that there was sufficient foundation for admission of the pliers because an Officer had identified the pliers as being the one introduced at trial. There was no analysis regarding whether the pliers should have been admitted into evidence for the asserted proposition that

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[1] It is not unreasonable for a young, black male living in a neighborhood with drug sales and liable to be stopped to run when approached by a police car. *State v. Arrington*, 582 N.E.2d 649, 658 (Ohio Ct. App. 1990).

the pliers were the metallic object in the hands of the Decedent. Regardless of whether the photographs were admitted, testimony asserting or suggesting the proposition that the pliers were in fact the shiny metallic object should not have been admitted under Fed.R,Evid, 403. Even though the pliers were admitted to place a shiny metallic object in the hands of the Decedent, there was never any evidence in the record establishing that the pliers were actually in fact in his hands.

Apart from the photographs, there was no evidence that the pliers had requisite indicia and reliability to be in the Deceased's hands not even his fingerprints.

The Respondents turned to race and the character of the Deceased neighborhood to justify their acts. But as discussed above, evidence regarding these factors is unconstitutional and is not relevant in explaining the use of excessive force. The Fifth Circuit must be directed, like other circuits, that excessive force cannot be justified just because a person is in a high crime area or that someone is seen fleeing from his car. There was an absence of reasonable suspicion of criminal activity. But since the Deceased was in a minority community, he, like other minorities, is subjected to stops, frisk, beatings and lethal injuries in the absence of any wrongdoing. Because of such large numbers of complaints from minority community citizens regarding police excessive force, minority community citizens have prompted the NAACP to announce the ending racial profiling as a top organizational priority. Paul Zielbauer, Racial Profiling Tops NAACP Agenda, N.Y. Times, July 11, 1999 at 23. More often than not, minority citizens are subject to harsher treatment than white during police encounters. John J. Monahan, Hearings on

Alleged Police Abuse Set, Telegram & Gazette, September 5, 1999, at A3.

Therefore, it is the court's role to guard against excessive force by the police without their objective evidentiary justification. Terry v. Ohio, 392 U.S. 1 (1968).[2] There was no justification in our case. So, the use of race, stereotype and neighborhood does not justify the excessive force. The Fifth Circuit's decision is unconstitutional and contra other circuits.

The prejudicial effect of the judge's allowance of the unconstitutional statements is ground for relief. 33 ALR5th 205; 88 ALR4th 209. The Supreme Court in Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933), outlined that the role of a federal judge to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, and by drawing their attention to the parts of it which he thinks important. The district court should have made it clear that the statements and evidence regarding the racial background and type of neighborhood were completely irrelevant. By failing to do so, the court abused its discretion, since these facts unfairly prejudiced the Petitioners. The district court judge should have interrupted or cut off defense counsel as a matter of discretion. Coats & Clark, Inc. v. Gay, 755 F.2d 1506 (11th Cir. 1985).[3]

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[2] The *Terry* court ruled that the ambiguous nature of flight did not rise to the level of reasonable suspicion required to justify the officer's action. Evidence of a high-crime area is too vague to support the use of excessive force.

[3] Our case can be compared to the trial judge's acts in the *Coats* case. In *Coats*, the trial court judge had an attitude of impatience and antagonism that established the mood of the trial thereby causing an unfair trial since the acts were prejudicial. The Circuit Court of Appeals for the Eleventh

Therefore, since the per se unconstitutional statement without supporting evidence was submitted to the jury., then this Honorable Court must reverse the lower court's decision and rule that statements regarding a person's race and neighborhood to allegedly justify excessive force is unconstitutional.

B. THE IMPERMISSABLE PLAYING OF THE RACE-CARD BY THE DEFENSE COUNSEL IS PLAIN ERROR PER SE AND A NEW TRIAL IS WARRANTED WITH OR WITHOUT OBJECTIONS FROM PLAINTIFFS' COUNSEL.

Improper comments from the bench or from counsel warrant a reversal if they so permeate the proceedings that they impair substantial rights and cast a doubt on the jury's verdict. Buford v. Rowan Cos., 994 F.2d 155, 157 (5th Cir. 1993). The Respondents' attorney, the defense attorney, continuously used improper comments during his closing argument and throughout the case. When a party fails to properly object, a narrower standard of review, the "plain error" standard, is used. Johnson v. Helmerich & Payne, Inc., 892 F.2d 422 (5th Cir. 1990); Rush v. Smith, 56 F.3d

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Circuit stated that where a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial, the absence of objections will not preclude review since counsel will be loathe to challenge the propriety of a trial judge's utterance for fear of antagonizing him and thereby prejudicing a client's case. *Milley v. Delta Marine Drilling Co.*, 473 F.2d 856, 857-58 (5th Cir.), *cert. denied*, 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973). Our case is more prejudicial since, the Petitioners objected to the defense counsel's comments and the judge did nothing to cure the prejudicial statements.

918 (8th Cir. 1995), cert. denied, 116 S.Ct. 409, 133 L.Ed.2d 328 (1995).

However, contrary to the lower court's opinion, the Petitioner objected to the closing arguments. First, on November 10, 1997, the Petitioners filed a Motion in Limine wherein they stated that: "The defendant should be excluded from planting any seeds of racial stereotype pursuant to Fed.R.Evid. 403 because of the decedent's race and because of the character and nature of the neighborhood in which the decedent died".

Second, after the Respondents' closing arguments, the Petitioners' attorney requested a side-bar outside the presence of the jury wherein he specifically complained about the number of inflammatory comments the Respondents' attorney made; that the comments were based on no evidence; and that the comments only roused emotion and passion into the matter.

Third, the Petitioner filed a Notice and Motion for Post-Verdict Relief pursuant to Fed.R.Civ.P. 59 based upon the defense counsel's comments regarding racial stereotypes in high crime areas, without any curative instructions, among other things.

Therefore, the Circuit Court erred in not applying the proper standard of review; they should have based their decision upon an "abuse of discretion" review, not a "plain error". The closing argument must be limited to admissible evidence. When an attorney makes inappropriate comments regarding during opening and closing arguments that are objected to, the correct standard of review is the "abuse of discretion", not the "plain error doctrine".

The plain error doctrine should be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result. United States v. Young, 470 U.S. 1, 15 (1985); United States v. Frady, 456 U.S. 152, 163, n.14 (1982); Jury Interrogatories and the Prosecution

of Error in Federal Civil Cases: Should the Plain Error Doctrine Apply, 1999 St. Mary's University of San Antonio, 30 St. Mary's LJ 1163 (1999).

Where there have been improper remarks by counsel and the trial judge's response is inadequate, a new trial should be granted if, after considering counsel's trial tactics as a whole, the evidence presented, and the ultimate verdict, the court concludes that manifest injustice would result by allowing the verdict to stand. Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993). The 5th Circuit failed to use its "abuse of discretion" standard in the present case as established in the cases Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 269 (5th Cir. 1994); Jonas v. City of Atlanta, 647 F.2d 580 (5th Cir. 1981) (the court held that the trial court abused its discretion in failing to take steps to remedy the prejudicial effect of numerous improper statements made by the defense counsel in his closing argument).

The defense attorney's closing arguments focused on allegations that the Petitioner's attorney made the jury be in court for four days, there was no need for the trial to take four days, shifted the purpose of the hearing to money, commented that the Petitioner's attorney was soliciting business prior to the Deceased's actual death, stereotyped the Deceased as a drug addict, a gang member, a criminal, and a gun carrier just because of the color of his skin. These comments were highly prejudicial and irrelevant. Moreover, the statements aroused the jury's emotion and passion in favor of the police actions.

The closing arguments of defense counsel were so inflammatory, they caused the jury to cast a negative impression about the Deceased – since the Deceased was black and in a high crime area, he is automatically a stereotypical criminal. Since the court failed to give curative instructions, the courts' acts amounted to reversible

error. The Fifth Circuit should have reviewed the closing argument based on the court's ruling on the motions in liming, the jury charge and any corrective measures implemented by the court after the closing arguments. Westbrook v. Genera Tire and Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985).

The Petitioners never waived their right to object. The defense counsel's frequency and magnitude of the remarks were to clearly indicate his intent to raise the inference of guilt. Instead the lower courts used their own subjective standard as to what constitutes "enough" objections to create an "abuse of discretion" standard of review versus a "plain error" standard of review. In order to preserve the basic integrity of the judicial process, since the objections to the comments were made, the "abuse of discretion" standard must be used on appeal.[4]

II. THE MOTHER OF THE DECEASED HAS A RIGHT TO ASSERT A VIOLATION OF HER CONSTITUTIONAL RIGHTS OF ASSOCIATION ARISING FROM THE DEATH OF HER SON.

Excessive use of force resulting in a child's death violates a mother's asserted constitutional right to continued family association. The Officer abused his power and his mother should be compensated. Monroe v. Pape, 365 U.S. 167, 172 (1961). The legislative history of 42 U.S.C. Section 1983 clearly demonstrates Congress' view that "a

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[4] Appellate courts generally follow the procedural requirements for timely objections to promote judicial economy, to encourage lower courts to correct errors in a timely manner, and to avoid unfairness to a prevailing civil party. *Debra L. Hovland, Errors in Interpretation: Why Plain Error is not Plain*, 11 Law & Ineq. J. 473, 493 (1993).

deprivation on a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy". Id.

The Circuit Court erred in declining to review whether the Petitioner had a constitutional liberty interest in the lost of her son. A relative who survives an unconstitutional killing may allege the wrongful death violated the survivor's own constitutionally protected right, because the rights asserted under Section 1983 are personal to a claimant. Other circuits have indicated that a parent may assert a Section 1983 claim based upon a constitutional and protected interest. League of Women Voters v. Nassau County Board of Supervisors, 737 F.2d 155, 160 (2nd Cir. 1984), cert. denied, 469 U.S. 1108 (1985); Truillo v. Board of County Commissioners, 768 F.2d 1186 (10th Cir. 1985).

The Fifth Circuit fails to adopt this cause of action, and, therefore, due to the disparity among the circuits, this Honorable Court must enforce the mother of the Deceased constitutional rights since her son died from excessive force of the Respondents.[5]

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[5] The Fifth Circuit does recognize that parents have a due process right and that the right is extinguished by the wrongful death of the child. *See Logan v. Hollier*, 711 F.2d 690 (5th Cir. 1983), cert. denied, 466 U.S. 936 (1984) and *Brown v. Board of Trustees*, 187 F.2d 20, 25 (5th Cir. 1951).

CONCLUSION

In evaluating the issue of excessive force, the Fifth Circuit allows stereotypes and race to be used in the Courts evaluations. The Court should grant certiorari to review these important matters, reverse the Fifth Circuit's and District Court's opinion, and order that a new trial should be granted. This Court should further find that the defense counsel's remarks be stricken from the evidence, and that the closing arguments were inflammatory and prejudicial, that the reference to a person's racial background and neighborhood characteristics are per se unconstitutional.

The Court should further find that the mother had a valid constitutional liberty interest claim.

Respectfully Submitted,

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(Any footnotes trail end of each document)

Green v. Stelly

98-30184

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October 15, 1999, Decided

PRIOR HISTORY: United States District Court for the Middle District of Louisiana. 96-CV-3258.

OPINION: Affirmed

Before POLITZ, DeMoss and BENAVIDES, Circuit Judges.

PER CURIAM

Appellant Cora Green ("Green") appeals from the district court's rulings admitting evidence of pliers found in decedent Ronald Green's car. She further appeals the admittance of certain comments made by defense counsel during opening and closing argument. Finally, she appeals the district court's conclusion that Green has no constitutional liberty interest in the companionship of her son, Ronald Green. We affirm.

I. Facts and Procedural Background

Just after 1:00 am on June 19, 1996, Officers Kenneth Stelly ("Stelly") and Christopher Polito ("Polito") were patrolling a high crime area in Baton Rouge, Louisiana. The officers observed a suspicious individual, who,

investigation revealed, was carrying a crack pipe. Officers Otis Nacoste ("Nacoste") and Kevin Heinz ("Heinz"), with whom Stelly and Polito were working, placed the suspicious individual in their police car and proceeded to the nearest precinct station. Stelly and Polito remained behind to continue their patrol of the area.

Within seconds of Nacoste and Heinz's departure, Stelly and Polito encountered Gordon Byrd ("Byrd"), standing by a car, putting something in his pocket. Upon seeing the officers, Byrd fled; Polito gave chase on foot. Stelly parked the police car, intending to aid Polite on foot; however, upon exiting his vehicle, Stelly immediately noticed that the door of the car next to which Byrd had stood was partially open, and extending out of that space was someone's leg. Stelly commanded the occupant, "Driver, show me your hands!" The driver, Ronald Green, remained still, so Stelly repeated the order twice more.

As steLLYy then moved forward, Ronald Green spun around, allegedly holding a pair of silver pliers in his right hand. Stelly mistaking the pliers for a gun barrel, fired a single shot to Ronald Green's head, killing him.

Cora Green, Ronald Green's mother, filed suit against Stelly and the City of Baton Rouge on July 9, 1996, alleging excessive force in violation of 42 U.S.C. § 1983. The district court held a trial in the matter in November, 1997, after which the jury returned a verdict in favor of the defendants

Green timely filed her appeal.

II. Admission of Evidence

We review a district court's decision to admit evidence for an abuse of discretion. See United States v. Izydore, 167 F.3d 213, 218 (5th *Cir.* 1999) "The admissibility of evidence is subject to the same *standards* and rules that govern the admissibility of evidence at trial." Rushing v. Kansas City S. Ry. Co., 185 F.3d 496, 504 (5th Cir. 1999). We will not reverse a district court's evidentiary rulings unless they result in substantial prejudice to the complaining party. see see also Fed. R. Evid. 103(a), Proving substantial evidence is the burden of the complaining party. See FDIC v Milalis, 15 F.3d 1314, 1319 (5th Cir. 1994)

Green argues that the district court improperly admitted evidence relating to the pliers. Specifically, Green contends that the district court admitted a photograph of the accident scene, depicting a pair of pliers on the floorboard underneath where Ronald Green's right hand hung of f the front seat, without proper foundation. Moreover, green maintains that the district court admitted the pliers themselves without evidence establishing that the pliers introduced in court were the same pliers found at the accident scene.

Stelly counters that ample eyewitness testimony placed the pliers at the accident scene, which provides sufficient foundation for admission of the photograph. Stelly also avers that Heinz identified the pliers introduced into evidence as the pliers found on Ronald Green's floorboard.

We hold that the district *court* did not abuse its discretion in admitting the photograph or the pliers, with respect to the photograph, Detective Ike Vavasseur ("Vavasseur") testified that he arrived, at the accident scene at 1:25 am and directed the photographer to take the photograph approximately 30 minutes later. He further

testified that the photograph represented an accurate and fair description of the accident scene.

Pursuant to Federal Rule of Evidence 901, all that is necessary for authentication is "evidence sufficient to support a finding that the matter in question is what its proponent claims." A witness authenticating a photograph need not be the photographer, nor need he know the condition or mechanism of the photography process. See United States v. Clayton, 643 F.2d 1071, 1074 (5th Cir. Unit 1981); United States v. Rochan, 563 F.2d 1246, 125]. (5th Cir. 1977) We hold that Vavasseur's testimony is sufficient to support a finding that the photograph depicted the layout of Ronald Green's body and its proximity to the pliers after the shooting.

The pliers themselves, likewise, had a sufficient foundation for admission Heinz testified on direct examination that the pliers introduced at trial were the pliers he saw, on the floorboard in Ronald Green's car, the night of the shooting. Therefore, the district court did not abuse its discretion in admitting the evidence concerning the pliers.

IV.
Argument to the Jury

Before setting forth the parties arguments and our analysis, we observe that Green made no objection to Stelly's counsel's arguments to the jury during opening and closing argument. Where the complaining party did not object during trial, we review a trial court's decision to permit an attorney's argument to the jury under the plain error standard. See United States v. Munoz., 150 F.3d 401, 415 (5th Cir. 1998) "Improper comments by counsel will not warrant reversal

unless they so permeate the proceedings that they impair substantial rights and cast doubt on the jury's verdict." Buf ford v. Rowan Cos., Inc., 994 F.2d 155, 157 n.1 (5th Cir. 1993).

Green contends that the following statements were improper During opening statement, Stelly's counsel told the jury, "And suddenly, the driver spins toward Officer Stelly with a shiny silver object in his right hand." Green maintains that no evidence supports the proposition that Ronald Green held anything in his hand. Additionally, in closing, Stelly's counsel opined, "And 99 out of a hundred times that Mr. Ronald Green would have had a gun. Officer Stelly was put in a position and he had no choice... He got caught in the unfortunate circumstance that this one of happened to be him." Green argues that no evidence supports this statement, which appeals to the juror's emotions by relying on gross generalities.

Stelly retorts that any possible improprieties were remedied when the district court instructed the jury that the attorney's statements are not evidence, we conclude that permitting these arguments to be made to the jury was not plain error, Stelly had presented substantial evidence that the area he was patrolling the night of the shooting was a high crime area. The "99 out of a hundred" statement was in reference to that evidence. Moreover, the district court instructed the jurors that the statements of counsel were not evidence, and Stelly presented both circumstantial and direct evidence that Ronald Green had the pliers in his hand when he turned to face Stelly. Considering these facts, Green cannot even establish ordinary error, much less satisfy the more exacting plain error standard we apply to determine the propriety of the challenged actions, Therefore, admission of

Stelly's counsel's arguments resulted in no prejudice to Green's substantial rights.

Inasmuch as Green has failed to show reversible error with respect to her foregoing arguments, we need not reach the cjuestion of Green's rights under 1983 to recover as a parent for the loss of her son's companionship. The jury found that Stelly did not use excessive force when he shot and. killed Ronald Green, so even if Green had such a right under 5 1983, she could riot recover in this instance.

V. Conclusion

We hold that the district court did not abuse its discretion when it admitted evidence concerning the pliers, and we therefore AFFIRM its evidentiary rulings,

We further hold that admitting Stelly's counsel's statements to the lury was not plain error, and we AFFIRM the district court in this respect as well.

AFFIRMED.

Footnote

FN2 On appeal Green raises no arguments disputing the jury's finding that the City of Baton Rouge properly trained Stelly. She therefore has abandoned any claims she had in this regard, See Fed. R. App. proc. 28 (a) (9); see also Yohey v. Collins, 985 P.2d 222, 224-25 (5th Cir. 1993) ("[Appellant has abandoned theswe arguments by failing to argue them in the body of his brief.")

Green v. Stelly

96-3258-B-1

United States District Court for the Middle District of Louisiana. 96-CV-3258.

Jan 22, 1998, Decided

RULING ON MOTION FOR NEW TRIAL

This matter is before the court on the motion of plaintiff Cora Green for post-verdict relief, i.e., a new trial, pursuant to Rule 59, Federal Rules of Civil Procedure.[fn1]

Following a jury verdict, judgment was entered for the defendants on November 24, 1997. Plaintiff Cora Green timely filed this motion for new trial on December 2, 1997. She identified nine grounds as the basis for her motion. Rather than filing a supporting memorandum with her motion, the plaintiff moved for an extension of time to file a memorandum until 20 days after the trial transcript was available. Although this motion was denied and the plaintiff was required to file a supporting memorandum within ten days from the date of the ruling (i.e., December 29, 1997), the ruling specifically provided that she could seek leave of court to file a supplemental supporting memorandum any time before the court ruled on her motion for new trial. Plaintiff filed no supporting memorandum whatsoever.

Grounds 1, 2 and 7 assert that the jury's verdict was against the weight of the evidence, ground 3 asserts that the verdict was contrary to law, ground 4 argued that defense counsel made inappropriate and prejudicial remarks during his closing argument, grounds 5, 6 and 8 contend that evidence was improperly admitted, ground 1 is a generic interest of justice claim, and ground 9 is merely a reservation of other grounds pending receipt of the trial transcript.

A plaintiff is entitled to a new trial whenever the jury verdict is against the great weight of the evidence. Winter v. Brenner Tank, Inc., 926 F.2d 476 (5th Cir. 1991). All of the evidence must be viewed in the light most favorable to the jury's verdict. Stokes v. Georgia Pacific Corp., 894 F.2d 764 (5th Cir. 1990)

The jury in this case was left to resolve substantial conflicting evidence. Defendant Stelly testified that as the plaintiff's son, decedent Ronald Green, turned toward him Stelly observed in Green's hand a shiny, metallic object which he perceived to be the slide of an automatic weapon. Stelly fired once, striking Green in the head, killing him instantly. As it turned out, there actually was no weapon. Officers recovered from the floor on the passenger side of Green's vehicle a small pair of pliers. Admitted into evidence were photographs depicting the position of Green's hands and the pliers in the vehicle. Also offered into evidence was testimony from emergency medical personnel and police officers regarding the position of Green's hands at the time these witnesses observed them. The jury was required to assess Stelly's credibility regarding what he saw the moment before he fired. The jury also had to weigh the evidence regarding the position of the pliers found in the vehicle and then consider whether it is more probable than not that Green

was holding the pliers in his hand when Stelly shot him. Although much other evidence was presented bearing on the reasonableness of Stelly's use of deadly force, the crucial issue for the jury to resolve was whether Stelly's use of deadly force was reasonable under all the circumstances.

Viewing the evidence in the light most favorable to the jury's verdict, the jury could have reasonably concluded by a preponderance of the credible evidence that Green heard- - but ignored--Stelly's repeated commands to "show me your hands," and as Green turned toward the open driver's side door, Stelly observed a shiny metallic object in Green's hands which Stelly reasonably concluded was the top slide of an automatic weapon. Given these factual findings, the jury could have further reasonably found that firing one shot at Green, albeit deadly and effective, did not constitute the use of excessive force in violation of Green's Fourth Amendment right.

Plaintiff's other arguments in support of her motion likewise lack merit. It is unclear what argument the plaintiff is making in her contention that admissibility of the pliers was improper evidence of underlying "intent and motivation." The admissibility of the pliers into evidence was addressed in connection with the plaintiff's motions in limine. Several witnesses testified regarding their observation of the pliers in the decedent's vehicle, including officers who saw the pliers on the scene before the vehicle was sealed and taken to the Louisiana State Police Crime Laboratory. There, the vehicle was searched pursuant to a warrant and the pliers were recovered. There was a sufficient foundation for the introduction of the pliers into evidence. Insofar as the plaintiff contends that the pliers were not relevant, the argument is frivolous.

Beginning at the pretrial conference and continuing thereafter, the plaintiff sought to interject a racial motivation into Stelly's actions. Plaintiff did not allege that Stelly's actions were racially motivated. Furthermore, the plaintiff's complaint regarding "racial stereotypes" was also addressed in her motions in limine. If any evidence of racial stereotypes was introduced at the trial, it was introduced by the plaintiff through the direct testimony of witnesses she called, or by the comments of counsel for the plaintiffs. Although the area in which this tragic shooting occurred was often referred to by the witnesses as a "high crime" area, the defendants' witnesses and their attorneys avoided describing or referring to the area in racial terms. This ground for relief has no merit.

During his closing argument counsel for defendant Stelly made a remark alluding to the number of guns possessed by persons living in the area where this shooting occurred. After closing arguments and outside the presence of the jury counsel for the plaintiff objected to the remark. The court concluded that the comments were at most hyperbole and did not warrant a curative instruction. Furthermore, prior to closing arguments the jurors were told that the closing arguments were not evidence, and this was reiterated in the jury charge. Plaintiff has not demonstrated that defense counsel's remark was sufficiently prejudicial to warrant a new trial.

Finally, the interest of justice does not support the plaintiff's demand for a new trial. Counsel represented their clients vigorously, and for the most part behaved professionally. At times emotions ran high, but not so much as to support the conclusion that the jury's verdict was swayed by emotion rather than the evidence. The trial was

obviously taxing and stressful on all the participants, including the jurors. In fact, one juror was dismissed after informing the court that if he were required to remain he would not vote on the outcome of the case. Rather than the interest of justice demanding a new trial, the interest of justice demands that this tragic event be concluded.

Accordingly, the motion of plaintiff Cora Green for a new trial is denied.[fn2]

Baton Rouge, Louisiana, January 22, 1998.

footnotes

[fn1]Also before the court is a motion to dismiss the plaintiff's motion for post-verdict relief filed by defendant Kenneth Stelly. This motion is not opposed.

[fn2] Defendant Stelly's motion to dismiss the plaintiff's motion for post-verdict relief is denied as moot.

Green v. Stelly

98-30184

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nov 30, 1999, Decided

PRIOR HISTORY: United States District Court for the Middle District of Louisiana. 96-CV-3258.

Before POLITZ, DeMoss and BENAVIDES, Circuit Judges.

ORDER DENYING REHEARING EN BANC

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular ative serice on the court having requested that the ocurt be polled on Rehearing En Banc, Fedd. R. App. P. and 5th Cir.R. 35 the Petition for Rehearing En banc is also denied.